[2026] JMSC Civ 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVL DIVISION

CLAIM NO. SU2023CV00528

BETWEEN	**BRIDGET MOORE**	**CLAIMANT**
AND	**ISLAND GULLY FALLS LIMITED**	**FIRST DEFENDANT**
AND	**CHUKKA CARIBBEAN ADVENTURES LIMITED**	**SECOND DEFENDANT**

IN CHAMBERS

Janeve Williams-Reid instructed by Nigel Jones & Co., Attorneys-at-law for the Claimant.

Vasheney Headlam instructed by Henlin Gibson Henlin, Attorneys-at-law for the 1st Defendant.

25th February and 5th March 2026

Civil Procedure - CPR rule 16.2 - Assessment of damages after default judgment CPR rule 26.8 - Rationale for approach and considerations for the court on applications for relief from sanctions

C. BARNABY, J

INTRODUCTION

[1] On 25th February 2026 the Claimant's Urgent Notice of Application for Court Orders filed 3rd October 2025 for relief from sanctions and extension of time (the

Application) came on for hearing. This follows an adjournment on 8th December 2025 due to its short service, non-service of the Claimant's Written Submissions and Authorities filed 5th December 2025, and the indication of Counsel for the First Defendant that the Application would be opposed.

[2] At the time of adjournment the First Defendant was permitted to file and serve affidavit evidence in response to the Application, and any submissions and authorities on which it intended to rely. The First Defendant's Submissions Opposing Claimant's Application for Relief from Sanctions was filed on 11th February 2026 and duly served. No affidavit evidence was filed.

[3] On close of submissions on 25th February 2026, a decision on the Application was reserved to today's date and is now returned. For reasons below, I find that the orders sought on the Application should be refused. Before doing so however, I find it relevant to set out the circumstances which gave rise to the Application and the specific relief sought.

BACKGROUND TO THE APPLICATION

[4] The claim commenced on 21st February 2023 against two defendants jointly and or severally. Island Gully Falls Limited, the alleged owner and/or occupier operator of Blue Hole is named as the First Defendant. The Second Defendant was the tour company through which an excursion to Blue Hole was organised. The latter defendant having filed a defence, a case management conference was fixed.

[5] At the Case Management Conference on 18th March 2024 counsel for the Claimant and Second Defendant indicated that they were amenable to mediation. Consequently, the dispute between them was referred to mediation, which was to be concluded by a specified date. A further conference was fixed for 11th July 2024. The court also ordered that any issues as to expert evidence would be addressed at that further case management conference, in the event the dispute was not

resolved by mediation. The parties were required to file and serve applications in that regard at least seven (7) days before the 11th July 2024. Mediation was not attended and no application in respect of expert witnesses was filed.

[6] It also being indicated to the court on enquiry, that the Claimant intended to proceed in default against the First Defendant notwithstanding discussions with the Second Defendant, it was ordered that a request in that regard was to be filed. A request was so filed but the affidavit evidence in support being non-compliant with CPR rule 30.4(1)(d), it was refused.

[7] On 11th July 2024 the case management conference was again adjourned for the Claimant and the Second Defendant to attend mediation, on their indication that they still wished to do so. Mediation was to be concluded by a specified date and a further conference was fixed for 30th October 2024. The court ordered that in the event mediation did not resolve the dispute, applications which may be heard at a case management conference, including for the appointment of expert witnesses would be considered at that further conference. Applications were accordingly ordered to be filed and served on or before 21st October 2024. No applications were made.

[8] The conference fixed for 30th October 2024 was rescheduled and in fact came on the 3rd December 2024. Counsel for the Claimant advised that the mediation was ongoing and the Second Defendant had requested documentation - as to the Claimant's first interaction with a medical practioner in respect of the incident giving rise to the claim - which attempts were being made to locate and supply. On being advised that discussions were far advanced, the case management conference was further adjourned to 24th February 2025 to facilitate conclusion of those discussions. The time for the making of applications, including for the appointment of expert witnesses made on 11th July 2024 was extended to 7th February 2025 in the event the claim was not disposed by mediation.

[9] On 24th February 2025 the court was again advised that the Claimant and the Second Defendant's discussions were continuing. Once again no applications were filed. With anticipated conclusion by the end of March 2025 as certain documents from the latter's insurers were being awaited, another adjournment was granted for the discussions to be concluded. It was again ordered that if "the *parties"* did not arrive at a settlement, the time for complying with the order for making applications on 11th July 2024 was further extended to 9th April 2025. No applications were made.

[10] On 1st May 2025 when the matter again came before the court, settlement discussions between the Claimant and the Second Defendant were not concluded. The court was advised that the Claimant had raised for the first time that week the issue of lost wages for which documentation was requested. That sole issue prevented finalisation of discussions. Enquiries in that regard were made by the court of the Claimant who was present at the hearing, and it was confirmed that her response provided the clarity required to conclude the settlement discussions. The matter was accordingly fixed for announcement of settlement on 20th May 2025.

[11] At the hearing on 20th May 2025, the court was advised by Counsel that the claim against the Second Defendant was settled. Accordingly, it was minuted that *"1. The Claimant's claim against the Second Defendant is settled in terms endorsed on Counsels' brief."*

[12] The Claimant having obtained judgment in default of acknowledgment of service against the First Defendant on a renewed request filed on 31st January 2025, whether she intended to procced to assessment on it became a relevant consideration. On enquiry of Counsel Mrs. Williams-Reid in this regard it was indicated that the Claimant was in the process of preparing witness statements and intended to serve all relevant documents at once. On this indication and the statement on the renewed request for default judgment against the First Defendant

that the Claimant was in a position to prove the amount of the damages, an assessment date was required to be fixed.

[13] Having been previously advised of attempts to locate and supply documentation in respect of medical care and lost wages, it appeared to me that the Claimant might not be ready to prove the damages. I therefore considered it more appropriate to schedule an assessment of damages case management conference date before committing open court resources for an assessment date or period. As a result an assessment of damages case management conference was fixed for 14th July 2025 and the Claimant ordered to serve the order, the default judgment, list of documents, witness statements, certificates and notices under the Evidence Act, written submissions and authorities, and *"any applications by the Claimant, including for the appointment of expert witnesses"* on the First Defendant, on or before 13th June 2025. Orders were also made directing the First Defendant as to the steps it should take if it wished to be heard on quantum, consistent with the provisions of rule 16.2(2)(c) and 16.2(4).

[14] The Claimant did not comply with the case management orders of 20th May 2025.

[15] The court's view that the Claimant was not in fact in a position to prove the amount of the damages - contrary to the statement in the request for default judgment - was confirmed on 14th July 2025 when Counsel Mrs. Williams-Reid advised that the Claimant was unable to proceed to assessment. This was on account than she intended to make an application for the appointment of expert witnesses. I indicated to Counsel that there was no application before the court in that respect although I had specifically ordered that such applications by the Claimant were to be served on or before 13th June 2025. In fact, the Claimant had not complied with any of the orders made on 20th May 2025. There being no evidence that the First Defendant was notified of the hearing on 14th July 2025 however, the below orders, so far as relevant were made.

1. *Assessment of Damages hearing during the 2025 Michaelmas Term.*

2. *Assessment of Damages Pretrial Review is fixed for 2nd October 2025 at 12:10 a.m. for thirty (30) minutes.*

3. *The time within which the Claimant is to comply with the orders made on 20th May 2025 is extended to 31st July 2025.*

4. *If the Defendant wishes to be heard as to quantum, it must file and serve a notice in Form 8A within seven (7) days of service of the Claimant's witness statement(s), and written submissions and authorities on it.*

5. *Where the Defendant files a notice in Form 8A, it is at liberty to file and serve witness statements and written submissions and authorities on which it intends to rely at the assessment hearing within fourteen (14) days of service of the Claimant's witness statement(s), and written submissions and authorities on it.*

6. *Any counter notice(s) on which the Defendant intends to rely under the Evidence Act is to be filed and served within fourteen (14) days of service of the Claimant's notice(s) of intention under the Evidence Act.*

7. *Times under the Evidence Act are abridged as required by the orders herein.*

8. *Any applications which may be heard at a pretrial review, will be considered at the Assessment of Damages Pretrial Review. In consequence, all such applications are to be filed and served on or before 2nd September 2025.*

9. *On the filing of any application pursuant to order 8, the applicant is to produce a copy of this order to the Registry and request that the application be sealed, and the date of the Assessment of Damages Pretrial Review be inserted as the date for the hearing of the said application to facilitate timely service.*

10. *...*

11. *The Claimant's Attorneys-at-law are to prepare, file and serve this order; and file affidavit in proof of service of this Order and compliance with the case management conference orders for which time has been extended pursuant to order 3 herein, on or before 16th September 2025.*

12. *If the Claimant fails to comply with any of the orders herein, her claim shall stand struck out.*

[16] In an affidavit of service sworn and filed 31st July 2025, the court is advised that the Interlocutory Judgment in Default of Acknowledgement of Service, Witness Summary of Bridget Moore, Claimant's List of Documents, Witness Statement of Bridget Moore and Unperfected Formal Order of 14th July 2025 were filed and served on the First Defendant.

[17] The orders for the filing and service of certificates and notices of intention under the Evidence Act; applications by the Claimant, including for the appointment of expert witnesses; and written submissions and authorities for which compliance

was extended to 31st July 2025 were not complied with. In consequence, at the assessment of damages pretrial review on 2nd October 2025 it was ordered that *"[p]ursuant to order 12 made on 14th July 2025, the Claimant's claim against Island Gully Falls Limited stands struck out for failure to comply with case management conference orders for which time was extended to 31st July 2025 for compliance."*

[18] It is in these circumstances that the Claimant makes the Application seeking these orders.

1. *Relief from Sanction for falling to comply with the order made by the Honourable Justice C. Barnaby on May 20, 2025 and by extension July 14, 2025.*
2. *That the Claimant be granted extension of time to file and exchange Written Submissions and Authorities.*
3. *That the Claimant be granted permission to serve Notice of Intention filed on July 11, 2025 and further permission to file and serve an amended Notice of Intention.*
4. *That the Claimant application to appoint expert witness on August 29, 2025 and that was served on the 1st Defendant on September 2, 2025 be permitted to stand as filed.*
5. *That cost be cost in the claim.*
6. *That there be such further or other relief as this Honourable Court deems just.*

[19] The reasons for concluding that the orders should be refused follow.

REASONS

[20] CPR rule 26.8 provides that

> *(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*
>
> *(2) The court may grant relief only if it is satisfied that -*
>
> *(a) the failure to comply was not intentional;*

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to -

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[21] As to how the rule is to be understood and applied, I find valuable assistance in the decision of Sykes, J as he then was in **HDX 9000 Inc v Price Waterhouse (a Firm)** [2016] JMCC Comm 29 which was supplied by the Claimant. Sykes, J enthusiastically adopted the dictum of Jamadar JA, as he then was, in **Trincan Oil Limited v Martin** Civil Appeal No 65 of 2009 (unreported) (delivered May 2009) relative to rule 26.7 of the Trinidad and Tobago rules which are identical to our rule 26.8. His Lordship helpfully sets out how the rule is to be understood and the rationale for the approach taken to relief from sanctions. While lengthy, I find it timely to substantially reproduce the dictum, particularly for its latter value.

13. The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard

to in considering whether to exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7 (3) are not satisfied.

14. [After first briefly identifying the differences between the pre 2013 English rules and why they provide limited assistance in interpreting rule 26.7, his Lordship observed that]

15. … the differences between the local and English rules are intentional. The English rules were available when the local rules were drafted and agreed upon and they were carefully considered in the process. The differences in Rule 26.7 and the corresponding English rule were intended to effect a particular behavioural change from the way civil litigation was conducted in Trinidad and Tobago under the Rules of the Supreme Court, 1975.12

16. Dick Greenslade, the draftsman of the rules, explained the philosophy underlying his proposed rule for relief from sanctions as follows:

I therefore propose that there be a system whereby the defaulter could apply for relief. There would be a 'threshold' test – the court would grant relief only if it is satisfied that –

- *the party in default has acted promptly in applying for relief; and*
- *the breach of the rule was not intentional; and*
- *there is a good explanation for the breach; and*
- *the party in default has generally complied with all other relevant rules and orders.*

No relief would be granted if the threshold test were not surmounted.

However, passing the threshold test would not be sufficient in itself, it would only give the court a discretion to grant relief. In exercising its discretion the court should take into account

- *whether the breach was due to the party or his attorney;*
- *whether the breach has been or can be remedied within a reasonable time;*
- *whether the trial date can still be met if relief is granted.*

While I do not propose that the rule should specifically say so I would hope that the judiciary's view would be that only in exceptional circumstances should relief be granted if this would entail vacating the trial date.

17. Clearly this philosophy was adopted as Rule 26.7 follows the proposal except that a fourth factor was added to the matters to be taken into account if the 'threshold' test was surmounted: consideration of "the interests of the administration of justice".

18. The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under the RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions. The changes introduced in Rule 26.7 were intended to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and attorneys will become aware of them and will adapt their behaviour accordingly, thus effecting the desired change in culture.

19. Simply put, in the context of compliance with rules, orders and directions, the 'laissez–faire' approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated.

> *20. Finally, reliance on the overriding objective as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and application of the rules, but it is not intended to override the plain meaning of specific provisions.*

[22] It is my respectful view that it is with the foregoing in mind that enquiries into applications for relief from sanctions should be approached if the objectives of the rule 26.8 are to be met, and the culture of non-compliance which is regrettably still a feature of civil litigation in Jamaica, is to change.

Rule 26.8(1) requirements

Whether the Application was promptly made

[23] The Claimant relies on the decisions of **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 and **H.B. Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc. et al** [2013] JMCA Civ 1 in submitting that the word *"promptly"* in the rule has some degree of flexibility in its application, and that whether or not an application is prompt depends on the circumstances of the case. There is no doubt as to the correctness of these principles.

[24] While supported by affidavit evidence in the form of the Affidavit of Urgency of Kenisha Gordon in support of Notice of Application for Relief of Sanction and Extension of Time sworn and filed 3rd October 2025, and Further Affidavit of Marsha Chambers in support of Notice of Application for Relief of Sanction and Extension of Time sworn and filed 1st December 2025, I do not find that the requirement for promptitude has been met in the circumstances of this case. Both affiants are Attorneys-at-law in the firm representing the Claimant.

[25] The Claimant submits that her "*statement of case was struck out on October 2, 2025 and on October 3, 2025 [she], through her attorneys-at-law filed [the Application] … approximately one day after the order was made to strike out … "*

It is accordingly contended that the Application was promptly made. I find the submissions in these regards unmeritorious.

[26] In the first instance, the date for the Claimant to comply with the court's orders was 31st July 2025, failing which the sanction applied. The claim against the First Defendant being the only claim then in subsistence, it stood struck out as of 1st August 2025. The order made on 2nd October 2025 that *"[p]ursuant to order 12 made on 14th July 2025, the Claimant's claim against Island Gully Falls Limited stands struck out for failure to comply with case management conference orders for which time was extended to 31st July 2025 for compliance"* simply records that which was already realised. The Application was therefore filed two (2) months after the claim against the 1st Defendant was struck out.

[27] Neither party has cited it but I am aware of the relatively recent decision of the Court of Appeal in **Oneil Edwards v Jamaica Public Service Company Limited** [2025] JMCA Civ 13 where Foster-Pusey JA, after citing a number of authorities including the **H.B. Ramsay case** found at paragraph [46] that *"… the promptness of the application must, in [the] circumstances [then before the court which were believed], be assessed in the context of when the error or oversight was discovered."* I do not take this finding to be representative of any broad proposition that promptitude of an application is to be assessed only by reference to the date of discovery of the failure to comply with a rule, order or direction to which a sanction applies. The context within which the discovery was made must be scrutinised, for as Foster-Pusey JA righty and earlier observed in the very judgment,

> *[42] [a]n application for relief from sanctions, pursuant to rule 26.8, is usually made because a duty imposed by the court or the rules has not been fulfilled within the relevant timelines. So the circumstances usually involve some delay, but, nevertheless, the application for relief must be made promptly. As Arden LJ commented in* Regency Rolls Limited v Carnall*, it is not that the applicant has not been guilty of some delay, but the applicant must have "acted with all reasonable celerity in the*

> *circumstances". How does the court make this assessment?* ***The court must consider the circumstances surrounding the timing of the application to determine whether it was made promptly.***
>
> [Emphasis added]

[28] In the **H.B. Ramsay case** Brooks JA considered an argument by counsel that in assessing whether an application was prompt, account should be taken of the time when the applicant discovered the default. The learned Justice of Appeal found that the submission did not have much weight in the context where a sanction was applied pursuant to an unless order. He reasoned that in those circumstances, the deadline for compliance should be uppermost in mind of the affected party who is given notice of the requirement and the penalty for non-compliance. The Court of Appeal in **Oniel Edwards** referenced the finding and the rationale for it, and expressed no doubt as to the correctness of either.

[29] The order imposing the sanction for non-compliance with the court's orders on 14th July 2025 was made in the presence and hearing of the Claimant and her Counsel, and was made in response to non-compliance with previous case management orders of the same kind. It was also pointed out on the very occasion that there was no application before the court for relief from sanctions in respect of the filing and service of disclosure, and the service of witness statements by a specified date for which the rules imposed its own sanctions. While no sanction was imposed by the court when the first set of case management orders were made, having regard to circumstances in existence on 14th July 2025 and having regard to the stated importance of the case to the Claimant, the deadline for compliance should have been at the forefront of her mind and that of her Attorneys-at-law. It ought not to have taken two (2) months and the minuting of an order for the default to be discovered and an application for relief made. In consideration of these circumstances which surround the timing of the Application, I do not find that it was promptly made.

[30] The above finding is sufficient basis for refusing the Application but agreeing as I do that the word *"prompt"* used in rule 26.8(1) has some degree of flexibility; and if I am wrong in concluding that the application was not promptly made, I will proceed to enquire into the requirements of rule 26.8(2).

Rule 26.8(2) requirements

[31] As indicated Sykes J stated in the **HDX 9000 case**, in reliance on the **Trinican** judgment, the requirements of rule 26.8(2) are cumulative. Further support for this view is to be found in many of the decisions of our Court of Appeal, including the **H.B. Ramsay case** and **Villa Mora Cottages Limited and anor. V Adele Shtern** SCCA No. 49/2006 delivered 14th December 2007 where Panton P observed at page 14 that:

> … *the conditions outlined in Rule 26.8(2) are fundamentally interwoven. They are inherently and intrinsically bound together as a determinative factor as to whether relief from sanction ought to be granted*.

In arriving at this conclusion Panton P relied on the remark of P. Harrison, JA (as he then was) in **International Hotels Jamaica Ltd. v New Falmouth Resorts Ltd.** SCCA Nos. 56 & 95/03 delivered 18th November 2005 that *"these conditions must be considered cumulatively in order to satisfy a primary test."*

[32] I now proceed to consider the three (3) conditions in the circumstances of this case.

(a) Whether the failure to comply was intentional; and (b) whether there are good reasons for the delay

[33] In the affidavit evidence filed in support of the Application, reasons for the delay in complying with the court's orders are supplied. Considering those reasons, I find it convenient to address the requirements at rule 26.8(2)(a) and (b) together.

[34] The Claimant relies on the finding of Sinclair-Haynes JA at paragraph 66 of the **Ray Dawkins case** that *"… the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration"*, and the findings of the court delivered by Batts J in **Shurendy Quant v Minister of National Security and the Attorney General** [2014] JMFC Full 01 that *" [16] [i]t is therefore manifest that the application for relief is prompt and that it is supported by evidence which demonstrates that any failure to comply was not intentional. The explanation is satisfactory and the breach has been remedied."*

[35] The findings in those cases were undoubtedly arrived at in consideration of their own facts, which are distinguishable from the instant, and do not assist the Claimant.

[36] As earlier indicated, the Claimant's failures - to which the sanction applies - relate to the service of notices of intention under the Evidence Act, the filing and service of any application for the appointment of expert witnesses, and written submissions by 31st July 2025. Each is addressed in turn.

Notice of Intention under the Evidence Act

[37] The evidence of Ms. Gordon is that the Claimant's Notice of Intention under the Evidence Act was served on the First Defendant, it being *"embedded"* in the Particulars of Claim filed on commencement of the claim. She goes on to acknowledge however, that when the order was made for its filing and service, the

court was of the view that a separate document was to be served. It is her further evidence that a Notice of Intention was filed on 11th July 2025 but was not served. The document was not delivered to the process server to effect service. She attributes the failure to inadvertence.

[38] There is no evidence before me to suggest that the default in serving the Notice of Intention filed on 11th July 2025 by 31st July.2025 was intentional. The authorities are clear however that inadvertence or administrative difficulties, is not generally a sufficient explanation for failure to comply. In these regards one may see for example, the decisions in **Elenard Reid and others v Nancy Pinchas and others** Claim no. C.L. 2002/R031, Supreme Court Jamaica, delivered 27th February 2009 and **Corey Jackon v Annmarie Phillips (Executrix in the Estate of Barington Garynor, deceased, testate) and anor** [2017] JMSC Civ 30 which were cited by the First Defendant in submissions.

[39] Before proceeding with the discussion in respect of failure to file and serve other documents, I wish to state my view on the practice which appears to have developed in the jurisdiction, especially in personal injury claims, for notices of intention under the Evidence Act to be included in the particulars of claim.

[40] Pursuant to rule 8.9., a claimant is required to set out in the particulars of claim or a specially endorsed claim form, a short as practicable statement of all the facts on which she intends to rely, and must identify or annex a copy of any document which she considers necessary for her case. In personal injury cases, additional requirements are prescribed for inclusion by rule 8.11, including attaching to the claim form a report from a medical practioner relating to the personal injuries alleged in the claim where it is intended to rely on the evidence of a medical practioner at trial. A defendant also has a duty to set out his case in a defence by stating all the facts on which he relies to dispute the claim. Such statements must be as short as practicable but must nevertheless address the matters prescribed at rule 10.5. These and other statements of case have as their primary purpose definition of the issues in dispute.

[41] Notices of intention under the **Evidence Act** serve an entirely different purpose. They inform the receiving party that the issuing party intends to introduce evidential material at trial without calling the maker of the evidence. Their inclusion appears to me to fall outside of the parameters of Parts 8 and 10 of the CPR and rules relating to pleadings generally. Additionally, the inclusion of these notices may also have the effect of making statements of case prolix contrary to the rules of court. To avoid either pitfall or the serious consequence which may flow from them, care really should be taken to avoid the practice of *"embedding"* notices under the Evidence Act in particulars of claim or specially endorsed claim forms.

Application to appoint expert witnesses

[42] Ms. Gordon avers in her affidavit that the failure to file and serve the application to appoint expert witness by 31st July 2025 was not intentional, and was the result of a genuine misinterpretation of order 8 made on 14th July 2025.

[43] Order 8 directed that *"any applications which may be heard at a pretrial review, will be considered at the Assessment of Damages Pretrial Review. In consequence, all such applications are to be filed and served on or before 2nd September 2025."*

[44] It follows orders directing the First Defendant on the steps it must take if it wished to be heard as to quantum and is preceded by an order specific to the Claimant. That is, *"the time within which the Claimant is to comply with the orders made on 20th May 2025 is extended to 31st July 2025."* There is no averment that this specific order was misunderstood. Among the express orders made on 20th May 2025 is that *"the Claimant is to serve the following on the First Defendant on or before 13th June 2025*: … (e) *Any applications by the Claimant, including for the appointment of expert witnesses".* There is also no evidence of a misunderstanding of this order. On the contrary, other documents the subject of order 3 were served within the extended period for compliance. In these circumstances misunderstanding of

order 8 is not accepted as a good explanation for the delay in complying with the court's order.

[45] Ms. Gordon goes further to say that amended medical reports from an orthopaedic surgeon and a knee specialist were still being awaited as the reports on file are not in format required by the CPR for expert reports. She gives evidence that at the case management conference on 20th May 2025 it was thought that the amended medical reports would have been received in time to comply with the court's order for service by 13th June 2025. It is also her evidence that *"since that date"* it was realised that the request for the amended medical reports were through respective hospital portals.

[46] It is to be recalled that the claim was filed on 21st February 2023 so that in May and June 2025 it would have been before the court for over two (2) years. The latter indication from Ms. Gordon begs the question - when and what efforts were made by the Claimant to instruct any of the intended expert witnesses? The evidence before the court does not answer the question. The belated realisation as to what was required to obtain the expert reports is not a good explanation for the failure to comply with the court's order for the filing and service of an application to appoint expert witnesses by 31st July 2025.

[47] Additionally, the absence of a document in the form of an expert report is not a good reason for the failure to comply with the court's order for applications for appointment of expert witnesses. Such an application can be made in appropriate circumstances, and they often are, without also applying for a report to be put if no report is at hand. Where such an application is made and granted, the court can make consequential orders including but not limited to the filing and service of such a report and direct when questions as to putting in of such a report will be considered.

[48] I also find that the delay in complying with the order for the filing and service of an application to appoint expert witnesses was deliberate and intentional. The

explanation given for the default demonstrates that a choice was made to await the receipt of medical reports in the form of expert reports on which the Claimant hoped to rely at the assessment. That is clear on Ms. Chambers' evidence that the medical reports are needed to advance the Claimant's case for damages.

[49] In all these premises I find that the failure to comply with the court's order to file and serve an application for the appointment of expert witnesses by 31st July 2025 was intentional, and that there is no good explanation for the failure.

Written submissions

[50] It is Ms. Chambers' evidence that the intended experts' "*medical reports are needed to advance the Claimant (sic) case for damages and thus essential for our written submissions."*

[51] Ms. Gordon's evidence is that the failure to comply with the order for filing and service of written submissions was due to administrative oversight. She avers that although orders were made, primary focus was on getting the witness statements and list of documents served in time, as those documents formed a part of the Claimant's case. The evidence is also that the legal assistant who was tasked with the preparation, filing and service of the submissions had indicated when pressed, that the draft submissions were prepared but not filed because the amended medical reports on which the Claimant intended to rely as part of her case were being awaited.

[52] My view of the foregoing evidence is that a decision was taken to prioritise compliance with some of the courts orders and not others based on what was thought to be significant, and to await the amended medical reports to file and serve the written submissions. I find that the delay was deliberate and intentional in the circumstances.

[53] In the face of a sanction of the kind imposed here, it is my respectful view that a party does not have the liberty to pick and choose which of the court's orders it will comply with.

[54] Further, while parties may consider written submissions to be less important to their cases when compared to witness statements or list of documents, such a view ignores the fact that timely service of written submissions is critical when a matter is proceeding in default and the application requesting the same states that the claimant is in a position to prove the damages. This is evident on a reading of rule 16.2(2)(b) which provides that unless a claimant states that she is not in a position to prove the amount of damages, she must file and serve witness statements and written submissions within fourteen (14) days of service of an assessment notice. The defendant is then at liberty to file and serve witness statements and written submissions within fourteen (14) days of being served with the claimant's corresponding documents. This is in aid of the prompt conduct of assessments where a claimant has signalled readiness to prove the damages. The orders made on 20th May and 14th July 2025 for the filing and service of witness statements and written submissions, to which there were no objections, were so modelled.

[55] It having been stated in the request for default judgment that the Claimant was in a position to prove the amount of the damages, the absence of medical reports on which she intended to rely to prove the same cannot be accepted as a good explanation for the failure to comply with the order for filing and service of written submissions. To find otherwise will no doubt encourage misrepresentation as to readiness on requests for default judgment which then imposes an obligation on the court to schedule assessment of damages hearing dates where claimants are not in fact ready to proceed to assessment. This then results in the allocation of very scarce open court resources for matters which ought properly to proceed to case management in Chambers. When a claimant is not in a position to prove her damages rule 16.2(1)(a) requires her to say so to enable the court to schedule a case management conference pursuant to rule 16.2(3).

[56] In all the foregoing circumstances the reasons provided for the failure to comply with the order for the filing and service of written submissions are not accepted as good explanations for the delay and do no cause me to be satisfied that the delay was not intentional.

[57] In addition to the particular reasons given for the failure to comply with the orders for the filing and service of each of the documents referenced in the preceding paragraphs, the Claimant also relies on administrative challenges.

[58] Ms. Chambers' evidence is that the firm which has a number of branches across the island is experiencing significant challenges caused by the departure of a number of attorneys-at-law and other staff such as a legal assistants during the relevant period. The court is advised that the Claimant's claim is handled by the Ocho Rios office and that a *"new"* legal assistant was hired there in November 2023 consequent on the resignation of the former assistant in or about June 2023. Further, on the resignation of an attorney-at-law with conduct of the instant matter in or about April 2024, Counsel Mrs. Williams-Reid who is primarily assigned to the firm's Mandeville branch was tasked with conduct of files at the May Pen and the Ocho Rios branches. Owing to the workload of the branches overseen by Mrs. Williams-Reid, and having regard to the distance between the branches it was said to be impractical for her to visit the Ocho Rios branch. Consequently, she relies heavily on the legal assistant there. The evidence goes further to say that upon receipt of the formal orders of May and July 2025, they were emailed by Mrs. Williams-Reid to the legal assistant to ensure compliance with the orders of the court.

[59] Ms. Chambers also avers that since the mediation brief prepared in the matter already contained submissions as to special and general damages, it was sent to the legal assistant on or about 11th June 2025 to fast-track preparation of the written submissions. That was two (2) days before the submissions were due to be filed and served pursuant to the 20th May 2025 order. An email of 11th June 2025 is exhibited wherein the legal assistant reminds Mrs. Willimans-Reid to send

precedents including for written submissions and authorities and the mediation brief in respect of this case.

[60] It is further averred that at all material times it was the intention of Mrs. Williams-Reid to ensure that all orders were complied with. While it is stated that when the legal assistant was pressed she indicated the draft submissions were prepared but not filed because the amended medical reports were being awaited, the date on which she was so pressed and by whom is not stated. There is no evidence before the court of when any follow up or oversight of the task in this regard was done by Mrs. Williams-Reid or any other attorney-at-law in the firm.

[61] It was aptly observed by Phillips JA in **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49, cited in the **Corey Jackson case** that *"counsel has a duty to act in the best interest of his client".* This is part and parcel of the duty owed to the court by counsel in the conduct of litigation. As stated by Lord Atkin at page 302 of **Myers v Elman** [1940] A.C. 282,

> *The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. But as far as the interests of the Court and the other litigants are concerned it is a matter of no moment whether the work is actually done by the solicitor on the record or his servant or agent …*

[62] Where the work is delegated to servants or agents of attorneys-at-law carrying on the profession alone or as a firm, it is not enough that tasks be so delegated with the hope that they are executed with due propriety. There must be necessary

oversight to ensure that they are so done. Anything less constitutes a breach of the duty owed to the court and the party represented.

[63] Heavy work load is not a good excuse for the failure to give effective oversight. As stated by Sykes J was in **Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café (No 2)** Claim no. 2007 HCV 03502, Supreme Court Jamaica judgment delivered 15th April 2011, and cited with approval by Simmons J in **Corey Jackson**,

> *The explanation of counsel and the entreaty not to visit her counsel's omissions on [the litigant] would make policing of the new rules impossible.* ***Taken to its ultimate conclusion, every litigant could simply blame his lawyer or the lawyer could easily say that he is to be blamed and the court would, as a matter of course, overlook the breach and grant relief.*** *Surely this is not the new culture being promoted by the CPR. If that were the case then [the] CPR would not be worth the paper that it is written on".*
>
> [Emphasis in the original]

[64] While the administrative challenges at the firm cannot be attributed to the Claimant herself, she was present at the hearing at which the orders were made and is taken to be aware of them and of the consequence for failure to comply. There is however no evidence from her or otherwise as to what efforts she made towards compliance with the court's orders as it relates to the supply of relevant expert medical evidence on which she intended to rely to enable the filing and service of the application for appointment of such witnesses and written submissions, which provision of those reports is said to have impacted.

[65] In any event, no reason has been provided to require the court to distinguish between the Claimant and her attorneys-at-law. The following extract from **Hytec Information Systems v Coventry City Council** [1997] 1 W.L.R. 1666 which was also cited by Simmons J in the **Corey Jackson** is instructive in this regard.

> ***Ordinarily this court should not distinguish between the litigant himself and his advisers.*** *There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly****, it seems to me that it would become a charter for the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself…***
>
> *[Emphasis in original]*

[66] In all the foregoing circumstances I do not find that the administrative challenges at the firm is a good explanation for the delay to comply with the orders of the court.

(c) Whether the Claimant has generally complied with all other relevant rules, practice directions orders and directions

[67] It is submitted by the Claimant that she has complied with the orders in relation to the filing and service of witness statements, list of documents and the application to appoint expert witnesses. As seen earlier in the discussion on the application for appointment of expert witnesses, there was delay in complying with the court's order.

[68] Further, and in any event, the enquiry is not limited to compliance with the set of orders to which the sanction applied, it relates to general compliance. The conduct of the Claimant throughout the litigation is accordingly relevant. When so

considered, I do not find that the Claimant has generally complied with all other relevant rules, orders and directions.

[69] Firstly, pursuant to rule 16.2(1) an application for default judgment to be entered under rule 12.10(1)(b) *"must"* state whether or not the claimant is in a position to prove the amount of damages. In the request on which judgment was entered against the First Defendant it was represented that the Claimant was in such a position. The affidavit evidence shows that she was not as it is her intention to rely on expert evidence in proof of her damages, which she has not yet received. Where a claimant is not in a position to prove damages, she is required to so state in her request. Having failed to do so, the Claimant cannot be regarded as being compliant with rule 16.2(1)(a).

[70] The record also shows that at hearings on 18th March, 11th June and 3rd December 2024, and 24th February and 1st May 2025 when the court permitted the Claimant and the Second Defendant to engage and conclude mediation or settlement discussions, the court directed that if those discussions did not settle the claim applications, including for the appointment of expert witness were to be filed and served by specified dates to enable their consideration by the court. The Claimant though clearly intending to rely on expert evidence failed to file and serve any such an application.

[71] The Claimant also failed to comply with the case management orders made on 20th May 2025 for which an order extending time for compliance was made on 14th July 2025. Among the orders made on 20th May was that the Claimant was to serve any application for the appointment of expert witnesses by 13th June 2024.

[72] On the foregoing assessment, I do not find that the Claimant has been generally compliant with all other relevant rules and orders of the court.

[73] In all these premises it is my judgment that the requirements at rule 26.8(2) have not been met and the Application for relief from sanction should be refused accordingly. In so concluding the Claimant's claim against the First Defendant

remains struck out rendering any enquiry into the application for extensions of time redundant.

Rule 26.8(3) considerations

[74] The Claimant references **HDX 9000 Inc v Price Waterhouse (a Firm)** in written submissions without its full citation. She submits that it is a crucial case for the court's consideration as Laing J exercised the discretionary power to grant an application for relief in circumstances where rules 26.8(1) and 26.8(2) were not satisfied. It is contended that this was done on consideration of the factors at rule 26.8(3). The copy of the judgment supplied to the court when requested is the judgment delivered by Sykes J in [2016] JMCC Comm 29 to which I have already referred.

[75] The court is nevertheless aware of judgment of the Court of Appeal in **Price Waterhouse (a Firm) v HDX 9000 Inc** [2016] JMCA CIV 18 in which an appeal was allowed in respect of a decision of a judge of the commercial division granting an application for relief from sanctions in circumstances where he found that the application was not prompt, and that the requirements of rule 26.8(2) had not been satisfied. Brooks JA as he then was, in delivering the judgment of the court stated:

> *[37] The learned judge in this case, having found that the application had not been made promptly, was, therefore, in error to have continued to consider the other aspects of rule 26.8. He compounded that error when he went on to consider the provisions of rule 26.8(3), despite his finding HDX had not complied with all the provisions of rule 26.8(2). The learned judge found that certain failures by HDX were intentional. Rule 26.8(2) is definitive in its terms. It clearly states that the court may only grant relief if it were satisfied that all three aspects of paragraph (2) have been satisfied…*
>
> *The learned judge, not having been satisfied of the application of those three aspects, ought not to have granted relief from sanctions. His reference to*

> *the criteria in paragraph (3) on the basis of applying the overriding objective was misguided. Judges must be reminded that resort to the overriding objective may only be had in the absence of specific provisions which are clear in their meaning…*

[76] It appears that the decision to which the Claimant refers in written submissions was overturned on appeal.

[77] In any event, there are a plethora of authorities which demonstrate that failure to satisfy the factors at rule 26.8(2) precludes consideration of those at rule 26.8(3). Among the authorities are the **Villa Mora Cottages Limited** and **International Hotels Jamaica Ltd. cases** referenced earlier. Both decisions were considered by the Court of Appeal in **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49 where Phillips JA in delivering the judgment of the court put the matter beyond doubt when she said this.

> *[36] … rule 26.8 of the CPR … is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) acts as a preliminary test which must be satisfied before the application can be considered by the court under rule 26.8(2). Rule 26.8(2) states three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…" As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any failure to satisfy those factors precludes the consideration of the court under rule 26.8(3).*

[78] Of course, where a court harbours reservation in concluding that the requirements of rule 26.8(2) have not been satisfied, I can see nothing wrong with the court saying so and proceeding to consider the factors at rule 26.8(3) on that basis. That course does not recommend itself presently and in the result, the enquiry into the Application ends on consideration of rule 26.8(2).

ORAL APPLICATION FOR LEAVE TO APPEAL

[79] Counsel for the Claimant seeks leave to appeal the decision to the refuse the Application on the ground that the court erred in concluding that the application was not prompt and that the requirements at rule 26.8(2) have not been met.

[80] In opposing the application Mr. Headlam submits that the court considered and applied correct principles, and that having regard to the reasons announced by the court, the application for leave to appeal is without merit.

[81] For the reasons stated herein in concluding that the requirements of rules 26.8(1) and 26.8(2) have not been satisfied to enable the court to grant relief from sanction, I am not satisfied that an appeal will have a real chance of success. The oral application for leave to appeal is accordingly refused.

ORDER

1. The order for relief from sanction for failing to comply with orders made on 14th July 2025 is refused.

2. In consequence of order 1, the following are refused:

    (i) order for extension of time to file and exchange written submissions and authorities;

    (ii) order to serve Notice of Intention filed on July 11, 2025, and for further permission to file and serve an amended Notice of Intention; and

    (iii) order permitting the Claimant's application to appoint expert witness filed on 29th August 2025 and served on the First Defendant on 2nd September 2025 to stand as filed.

3. The Claimant's oral application for leave to appeal is refused.

4. Costs of the Application to the Respondent to be taxed if not agreed.

5. The term "NEG 1" is to be inserted in the top centre of the first page of any documents to be filed prior to their filing at the Registry.

6. The Claimant's Attorneys-at-law are to prepare, file and serve this order.

Carole S. Barnaby
Puisne Judge